In the Court of Appeal of Alberta

Citation: United States of America v. Sosa, 2012 ABCA 242

Date: 20120808
Docket: 1101-0251-A
Registry: Calgary

Between:

The Attorney General of Canada
(On behalf of the United States of America)

Respondent
(Applicant)

- and -

Jorge Sosa
Also known as Jorge Vinicio Sosa Orantes

Applicant
(Respondent)

Reasons for Decision of
The Honourable Mr. Justice Brian O'Ferrall

Application for an Extension of Time to Appeal
and for Leave to Appeal

Reasons for Decision of
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[1] The applicant, Jorge Sosa (also as known as Jorge Vinicio Sosa Orantes), was committed into custody by Chief Justice Wittmann to await surrender for extradition to the United States to face perjury charges: *United States of America v Sosa*, 2011 ABQB 534, 521 AR 356. The United States has accused him of knowingly making false statements under oath to United States immigration authorities while applying for permanent residency, naturalization and, ultimately, for U.S. citizenship.

[2] Mr. Sosa wishes to appeal Chief Justice Wittmann's committal order. But before his appeal can be heard, Mr. Sosa requires two orders of this court.

[3] Firstly, he needs an order extending the time for giving notice of his appeal. Secondly, he needs an order giving him leave or permission to appeal. There is no right to appeal an extradition committal order unless the appeal is based solely on a question of law. When an appeal is based on questions of fact or questions of mixed fact and law, as Mr. Sosa's is, permission to appeal must first be obtained.

Extending Time for Filing Notice of Appeal

[4] With respect to the order extending time for filing the notice of appeal, section 50(1) of the *Extradition Act*, SC 1999, c 18 states that a person proposing to appeal an order of committal must give notice of appeal in accordance with the court's rules and no later than 30 days after the decision of the judge making the committal order. Chief Justice Wittmann ordered Mr. Sosa's committal September 2, 2011. Mr. Sosa did not give notice of his intention to appeal until October 19, 2011. He filed a second notice asserting other grounds of appeal January 24, 2012.

[5] Section 50(2) of the *Extradition Act* permits a judge of this court to extend the 30-day time limit. Mr. Sosa seeks this extension on the basis that, following Chief Justice Wittmann's decision committing him into custody, he was in the Calgary remand center, without counsel, unfamiliar with court procedures, and unable to secure and prepare the necessary notice until after the time for giving notice of appeal had expired.

[6] Having heard Mr. Sosa's explanation of the difficulties he encountered, I am prepared to extend the 30-day time limit. I accept Mr. Sosa's explanation for late filing of his notice of appeal. Furthermore, I believe that it is in the interests of justice that Mr. Sosa be given an opportunity to seek leave or permission to appeal.

[7] Mr. Sosa's application for an extension of time to file his two notices of appeal is granted.

Permission to Appeal

[8] I now turn to the question of whether Mr. Sosa ought to be given leave or permission to appeal. Section 49(b) of the *Extradition Act* says that leave or permission to appeal is required if the grounds of appeal involve a question of fact or a question of mixed fact and law. As will be apparent shortly, Mr. Sosa's appeal involves questions of fact and/or questions of mixed fact and law.

[9] The judge conducting the extradition hearing committed Mr. Sosa to stand trial in the U.S. on charges that he knowingly made false statements under oath to U.S. immigration authorities by failing to disclose his membership in the Guatemalan military and by denying that he had ever committed a crime for which he had not been arrested. The crime alleged was the massacre of unarmed civilians, including women and children, in the Guatemalan village of Dos Erres in 1982 by an elite unit of the Guatemalan Army of which Mr. Sosa was a commanding officer.

[10] The function of a judge conducting an extradition hearing is to determine whether there is evidence of conduct that, had it occurred in Canada, would have justified committing the accused for trial. The extradition judge does not have to be convinced that the accused is guilty of the charges. He must simply be satisfied that there is some evidence upon which a court could convict. His role is to determine whether there is sufficient evidence to warrant placing the accused on trial. He is not determining the guilt or innocence of the accused.

[11] An extradition hearing is somewhat like a preliminary inquiry in that what is to be determined is whether there is sufficient evidence to warrant requiring the accused to stand trial. However, there are significant differences between an extradition hearing and a preliminary inquiry. Chief Justice McLachlin commented on those differences in *United States of America v Ferras*, 2006 SCC 33 at para 48, [2006] 2 SCR 77:

> Evidence is admitted on a preliminary inquiry according to domestic rules of evidence, with all the inherent guarantees of threshold reliability that those rules entail. In contrast, evidence adduced on extradition may lack the threshold guarantees of reliability afforded by Canadian rules of evidence. A third difference comes from the ability of extradition judges to grant *Charter* remedies. These differences make it inappropriate to equate the task of the extradition judge with the task of a judge on a preliminary inquiry.

[12] The evidence in an extradition hearing is usually contained in a document known as the "record of the case" which section 32 of the *Extradition Act* states must be admitted into evidence by the judge conducting the extradition hearing. The record of the case in this case summarized the evidence available to the U.S. authorities for prosecuting the accused, but was not subject to cross-examination because no witness spoke to it. It did however certify that the evidence summarized or contained in it was available for trial and was sufficient under the laws of the United States to justify prosecution.

[13] Presumptively, if the prosecution adduces evidence of each element of the offence, whether in the record of the case or otherwise, the accused must be committed to stand trial in the foreign jurisdiction. However, the person sought for extradition may challenge the sufficiency of that evidence. The Attorney General for Canada argued that defences advanced by a person sought to be extradited are irrelevant. That may not be entirely correct given the Supreme Court's decision in *Ferras*. The extradition judge must look at the whole of the evidence presented. Particularly in the case of a charge of perjury, the defences may impact on whether the elements of the offence have been made out on even a *prima facie* basis. In this case however, the person sought to be extradited adduced no evidence. The only evidence was that in the record of the case and that evidence, uncontradicted, was clearly sufficient to support the committal order.

[14] The Attorney General for Canada, on behalf of the United States Government, adduced evidence which indicated that Mr. Sosa made statements under oath which appeared to be false or misleading. The first false statement which Mr. Sosa is alleged to have made is that he had never committed a crime for which he was not arrested. The second false statement was that he advised the U.S. authorities that he had no prior military service. The third false statement alleged to have been made by Mr. Sosa was that he had never given false or misleading information while applying for any immigration benefit or to prevent removal from the United States. There was evidence that all three statements were made by Mr. Sosa on forms which he had to certify under oath were true and correct. And there was evidence suggesting all three statements were false. In addition, the Attorney General adduced evidence to suggest that Mr. Sosa may have known the statements were false when he made them. Finally, there was evidence that Mr. Sosa, by making the statements, may have intended to deceive the U.S. authorities in order to have them look favourably on his naturalization and citizenship applications.

[15] None of the three essential elements of the charge of perjury have been proven beyond a reasonable doubt; but sufficient evidence of all three elements was put before the extradition judge such that a reasonable, properly instructed jury could reach a guilty verdict. So without more, the decision to commit must be upheld. However, there was more. Following the extradition hearing and in support of his application for leave to appeal, Mr. Sosa produced documents which he claimed proved his innocence.

Military Service

[16] Mr. Sosa attempted to adduce evidence before this court in the form of an extract from his 1985 U.S. asylum application. That extract indicated that Mr. Sosa had fully informed the U.S. authorities of his Guatemalan military service. Putting aside the admissibility of that evidence, adduced as it was for the first time on this application, if that evidence had been before the extradition judge, it would have indicated that Mr. Sosa disclosed his military service in 1985. However, in 1998, when he was applying for permanent residency, Mr. Sosa was again asked about his foreign military service. This time, Mr. Sosa's answer was "None" and that answer was given

on a form which Mr. Sosa certified, under penalty of perjury, was true and correct. In 2007, when applying for naturalization, Mr. Sosa once again failed to disclose his prior membership in the Guatemalan military.

[17] Mr. Sosa also argues that none of the evidence contained in the record of the case establishes that he committed perjury. He may ultimately be proven to be correct; but that is for a U.S. court to decide. There is certainly some evidence that he knowingly made false statements under oath. Furthermore, the evidence which Mr. Sosa adduced on his leave application, in the form of the extract from his 1985 asylum application, indicates that he may have known that the statement he gave in 1998 about having no prior military involvement was false or misleading. And when the 1998 statement was made, Mr. Sosa was applying for immigration benefits or trying to avoid removal from the United States. In other words, there was also evidence of the third element of perjury, namely an intention to deceive in order to gain a benefit.

Crime But No Arrest

[18] With respect to the other statement Mr. Sosa is alleged to have made, namely that he had never committed a crime for which he was not arrested, there was evidence adduced, in the form of written statements by two soldiers who had taken part in the slaughter, that Mr. Sosa, one of their commanding officers, had participated in the killings of women, children and unarmed civilian men.

[19] On his application for leave to appeal, Mr. Sosa submitted orally that he was not at Dos Erres when the massacre took place. He also provided a translation of a letter from his family's lawyer in Guatemala, as well as an internet article, indicating that charges against him and 16 other soldiers who were alleged to have taken part in the Dos Erres Massacre were declared void or illegal. Apparently Guatemala's national reconciliation legislation enacted in 1996 had not been complied with. According to the evidence submitted by Mr. Sosa, the reconciliation legislation stipulated that before there can be prosecutions for crimes which may have occurred during the period of armed conflict in Guatemala, a panel of judges of that country's Court of Appeal must first decide whether the crimes ought to be brought to trial or amnesty granted. That apparently was not done. However, in the letter from the lawyer, there is at least the suggestion that if the legislation was complied with, charges might still be laid. But, more importantly, this evidence does not prove that no crime was committed. Mr. Sosa is not facing extradition to Guatemala to face murder charges. The extradition is to the United States where the U.S. authorities allege that Mr. Sosa lied to them when he answered "No" to the question whether he had committed any crimes for which he had not been arrested. It will be up to the U.S. court to determine whether Mr. Sosa lied when he answered that question. And in determining whether Mr. Sosa lied, the U.S. court may have to determine whether or not he committed any crimes during the Dos Erres massacre.

[20] Mr. Sosa's evidence that he was not at Dos Erres when the massacre took place was not put before the extradition judge. But if such evidence had been put before the extradition judge, it would

not have been sufficient to avoid committal for trial in the United States. The extradition judge, having heard that evidence, would have been in the position of having eye witness statements indicating Mr. Sosa's participation in the massacre and Mr. Sosa's evidence that he was not there when the massacre took place. In the face of such conflicting evidence, the extradition judge would have had little choice but to commit Mr. Sosa for trial in the United States where this conflict in the evidence might be tested and resolved. I also note in passing that Mr. Sosa's evidence that he was not at Dos Erres is somewhat inconsistent with the fact of charges having been laid against him in Guatemala.

[21] Among the factors I must consider when determining whether to grant Mr. Sosa permission to appeal (leave) is whether his appeal has merit or whether not doing so would result in an injustice. I have carefully reviewed the extradition judge's decision, and it is my view that Mr. Sosa's appeal is hopeless. Nor is there any injustice in requiring him to answer the perjury charges in the United States. Accordingly, his application for permission to proceed with an appeal of the extradition judge's committal order is denied.

Conclusion

[22] The application for an extension is granted, but the application for leave to appeal is dismissed.

Application heard on July 25, 2012

Reasons filed at Calgary, Alberta
this 8th day of August, 2012

O'Ferrall J.A.

Appearances:

C.J. Dickins
for the Respondent

J. Sosa, Applicant
in Person